"The Transparency Fix: The Right to Know in Historical Context"
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Mark Fenster
University of Florida Law School
fenster@law.ufl.edu

The related concepts of "transparency," "freedom of information," and "the right to know" represent an ideal that can solve widespread institutional failures of administration and democracy. Over the course of several articles, I have contextualized and historicized these ideals in order to deepen our understanding of the imperfect contemporary state, and of how we think about our desire for a better one. I have critiqued the theoretical basis of transparency as a political and legal norm,[1] noted the difficulty of imposing transparency on the contemporary administrative state,[2] documented the various political and social movements that have attempted to advance transparency reform,[3] and offered case studies of a government entity[4] and a private one[5] devoted to disclosing secret state information. My overall thesis has been that transparency and the other concepts are impossible ideals to accomplish, based on certain muddy and untested assumptions, and likely not to be particular popular or workable if imposed in their strong, ideal form.

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[1] Fenster, "The Opacity of Transparency." 91 IOWA LAW REVIEW 885-949 (2006).

[2] Fenster, "Seeing the State: Transparency as Metaphor." 62 ADMINISTRATIVE LAW REVIEW 617-672 (2010).

[3] Fenster, "The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State," 73 UNIVERSITY OF PITTSBURGH LAW REVIEW ____ (forthcoming 2012).

[4] Fenster, "Designing Transparency: The 9/11 Commission and Institutional Form." 65 WASHINGTON & LEE LAW REVIEW 1239-1321 (2008).

[5] Fenster, "Disclosure's Effects: WikiLeaks and Transparency." 97 IOWA LAW REVIEW 753-807 (2012).

None of this is to deny that a visible government is a key attribute of democracy, or that transparency is almost always better than secrecy. But it is a way to understand why the contemporary, sprawling state often disappoints those committed to a truly popular, fully accountable, participatory democracy, and it is intended to help lead to a more fruitful understanding of transparency and secrecy as issues above all of information control, an ideal I developed in my first and more recent articles.[6] As I am on the first panel, I want to discuss a forthcoming paper called "The Transparency Fix," which provides an historical account of transparency advocacy in the mid-twentieth century and after, and to provide a brief summary of that part of the paper which considers the emergence of a "right to know" and "freedom of information" in the post-war period in the U.S. I have cut out the footnotes; you may find the full paper in draft form here.[7]

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Government transparency does not spring naturally from the modern democratic state. As Max Weber maintained, "[b]ureaucratic administration always tends to exclude the public, to hide its knowledge and action from criticism as well as it can." The prerogative to create and maintain information asymmetries is one that government entities and officials do not easily surrender. Open government laws, which create legally enforceable rules requiring government entities to make information available, are thus largely the consequence of concentrated political activism and advocacy. For more than five decades, a broad transparency advocacy movement, composed of a diverse array of organizations operating from the transnational to local level, has

[6] Fenster, "The Implausibility of Secrecy." 63 HASTINGS LAW JOURNAL _____ (forthcoming 2013), and Fenster, "Opacity."

[7] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1918154

attempted to address and mitigate the fundamental democratic and administrative problems that information asymmetry creates for legitimate and effective governance.

At its inception, the movement understood and defined excessive state secrecy as a problem caused by a scarcity of laws—one that could be solved by a powerful, wide-ranging, and publicly enforceable legal right to government information. The quintessential campaign, which had historical antecedents and contemporaries in the United States and elsewhere, was the mid-twentieth century effort in the U.S. that resulted in enactment of the federal Freedom of Information Act in 1966. That campaign has never ended. Numerous contemporary domestic and international non-governmental organizations (NGOs) endeavor to preserve, strengthen, and extend open government mandates.

But the results of the freedom of information (FOI) campaign's labors, while considerable, have not fully solved the problem that it sought to address, at least for the many advocates in the U.S. and around the world who regularly complain about the laws' limited scope and their inadequate enforcement. In recent decades, several new networks and groups have responded to these frustrations by advocating alternative means to open the state to public view—including Transparency International and other anti-corruption NGOs, the "digital transparency" movement that attempts to use information technology to enable public access to government data, and WikiLeaks. (I discuss these movements in the longer article.) Law, their efforts imply, is not the answer to secrecy, or at least not the only solution. These four campaigns—FOI, anti-corruption, digital transparency, and WikiLeaks—share a commitment to the nearly religious, normative concept of transparency around which they are organized, while each focuses on different issues and offers a distinct set of policy prescriptions. "Transparency" is a goal, a happy ending that inspires very different policy stories.

This article probes the continuities and discontinuities among these movements and in the stories they tell. My purpose is two-fold. First, I explain that each of these movements operates privately—that is, as an activist advocating from *outside* of the state—in search of a means to fix what it views as a fundamental and pervasive problem endemic to government. They share assumptions about the needs and rights of democratic citizens to have access to government information in order to mitigate—or, better, eradicate—the asymmetric informational advantage the state enjoys over its public. But they diverge significantly in how they understand not only the problem's causes but also the state itself. In extolling the virtues of its own particular fix, each campaign offers a broader vision of transparency's mission, one tied to its particular understanding of the current state and of the better state that it hopes will emerge under the administrative conditions that its work will surely help create. The transparency fix—an idea that occupies a pivotal position in contemporary debates about governance, administration, and regulation—thus reveals our political and social anxieties about administration and about how we understand and attempt to correct the shortcomings of administrative law.

Second, the article unveils transparency as a contested political issue that masquerades as an administrative tool. The existing literature advocating and developing transparency as a concept has failed to map out transparency as a diverse and contested political field; instead, it has assumed transparency's status as a universal norm and debated the technical and legal issues of optimal administration and application. But each transparency campaign's competing fix and vision of a more perfect, visible state rests on contested claims about the state's legitimacy and performance, and competing theories of law, policy, and the state. That is, each movement and its fix implicate "transparency" in a much broader set of normative commitments. To understand transparency as an historically contingent concept and administrative norm, one must understand

the political and social world within which it is defined by the networks, groups, and individuals who attempt to pressure the state to adopt their vision of visible, accountable governance. Viewed in context rather than simply as a transcendent normative goal or neutral technical tool, transparency emerges as a political concept that is deployed in diverse campaigns as a part of broader political and economic projects.

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The Right to Know and Freedom of Information Movement in the US

In the decades following World War I and especially in the latter years of World War II, leading U.S. newspaper editors and press associations actively worked to export abroad the American model of a private, for-profit press insulated from government oversight and censorship. Frequently referred to as a plan to promote the "freedom of information" and the public's "right to know," the campaign rehearsed the ideas that would culminate decades later in the Freedom of Information Act (FOIA). In addition to advocating in favor of public access to government information as one among many issues, the campaign helped sharpen the arguments in favor of limiting state secrecy, and it established the press' ability to collaborate with government entities to achieve that goal. The initial transparency advocacy movement eventually enjoyed legislative success and laid both the conceptual and organizational groundwork for what has become an international network of institutions advocating on behalf of transparency.

A. Exporting Rights and Freedoms

The initial campaign began as a response to two related issues: concerns about the availability of foreign markets for American newsgathering and distribution and a desire to

export American free press and liberal democratic ideals. The American press and especially the American wire services—which supplied national and international news to many local newspapers and thus, at the time, were the country's most global and national media firms—faced journalistic and economic constraints in attempting both to collect news in other countries and to export their products around the world. In the mid-nineteenth century, a cartel of major European news agencies, which included Reuters (Great Britain), Agence Havas (France), and Wolff (Germany) as its original members, had divided the world among themselves for purposes of newsgathering. They agreed both to geographic constraints limiting themselves to their demarcated territories and to publish international news only from the cartel's members. The American Associated Press (AP) was invited to join the cartel in 1887 and enjoyed the competitive advantages it provided for several decades. The AP did not find its participation entirely satisfactory, however. As the U.S. newspaper industry and the domestic market for news grew, the cartel's constraints on the AP's newsgathering operations abroad bridled the expanding company. The AP faced tougher domestic competition from the United Press (UP) (founded in 1907), which was unconstrained by the cartel agreement. At the same time, the AP had started its own newsgathering information in far-flung territories, first in South America and then around the world.

The AP was also concerned about the cartel's effects on news content. The European agencies had formal and informal ties to national governments that sought to shape news for propagandistic ends. As a result, the AP complained, foreign media frequently under-reported news from the United States and described the country in an uncomplimentary fashion. For the American press, this potent and dangerous mix of troubling practices—individual wire services that had close relationships with their own governments, a cartel with oligopolistic control over

international news distribution, and the lack of the objective news values that American news editors increasingly prized—endangered the press and nation's political and economic interests.

These conditions prompted news organizations—as both interested parties and upholders of emergent ideals for a free press—to help develop entrepreneurial, independent news media around the world. In the narrative that Cold War advocates constructed to tell the story about the necessity for informational freedom and rights, the AP's commercial triumph, in which the agency and its powerful general manager Kent Cooper broke free from and helped smash the global news cartel in 1934, was not merely a self-serving effort to expand the company's commercial reach. It also accompanied a full-fledged campaign to promote democracy. The cartel's demise, coupled with the havoc wreaked on German and French news production by the Nazi party's ascent and Germany's subsequent occupation of France in World War II, allowed American corporate entities to seize market share and gain influence through the distribution of news and propaganda to Western Europe and developing countries in the post-war period. Once the cartel was broken, Cooper proclaimed, no more would such a "perfect instrument that could covertly, effectively and without the suspicion of the uninitiated carry on the great game of international government propaganda." Indeed, as the AP and UP began to coordinate as well as compete, the U.S. emerged in the post-war period as the only nation with multiple news services, helping it to take a leading position in the global competition over news and media content. The American press' triumphant effort to advance what it viewed as the free markets it needed to thrive was ideological as well as profitable, a fact occasionally remarked upon by European skeptics.

Having defeated its competitors abroad, the American press turned evangelical. In its 1944 convention, the American Society of Newspaper Editors (ASNE), the most active trade

group representing news editors and journalists, announced a campaign to protect "the right of the people" against censorship and to advocate for "freedom of information" around the world. The campaign included a world tour undertaken (with the assistance of the State Department) by three editors during the waning days of the war to review the state of the press in other nations, lobbying efforts on behalf of international rights for a free press in the new United Nations, and collaboration with the Truman administration to spur development of an international press industry that would adopt the American model of the profession. Press representatives ultimately played key roles in the Sub-commission on Freedom of Information created by the UN's Human Rights Commission in 1947 and, alongside prominent Harvard constitutional law professor Zechariah Chafee, served as delegates to the Conference on Freedom of Information held in Geneva in 1948.

In a 1949 article, Erwin Canham, editor of the *Christian Science Monitor,* officer of the American Society of News Editors, and member of the American delegation in Geneva, surveyed journalistic practices around the world and ranked them against the preeminent work of the American media in supporting the American democratic model. None quite matched up, although Canada and Britain came close. Therefore, Canham argued, the U.S. must spearhead the effort to free the flow of information throughout the world and thereby expand political freedom and fight the growing threat of authoritarianism:

> Of course, despotisms of various degrees will finally end when the people really know what is happening to them—when they learn the facts of international and national life—and thus throw off their chains. Freer information, in the broadest sense, will ultimately bring tyranny down. And so the efforts to lower barriers will ultimately produce conditions that will bring about a truly free press everywhere.

The specter of "tyranny" he identified meant the Soviet Union, of course, the principal Cold War threat. Alongside many of his fellow prominent newspaper editors, Canham played a semi-official role in the United States' effort to spread its vision of a liberal democracy abroad. For Canham and his colleagues, the ideal press was private, independent, and capable of objectively reporting on events, and enjoyed and helped enforce liberal democratic rights. The press under an authoritarian government, by contrast, served as the state's mouthpiece, a propaganda organ rather than a true Fourth Estate. A truly free press, therefore, required not only a private, independent set of media institutions but also a limited, non-intrusive state. It was up to the U.S. and its press institutions to spread the word.

Ironically, this project—intended to promote the ideals of a free press—required underwriting by the very government whose clutches journalists feared. The midcentury American press viewed the federal government's intervention in the marketplace of ideas and news as a significant, authoritarian-like threat to American democracy. During World War I and its aftermath, the government had not only acted as an official censor, a traditional role for the state during wartime, but also as a major producer of informational content akin to propaganda. The government's post-war informational activities now included pushing material to the public in order to grab the attention and shape the attitudes of its citizens, like the growing consumer-goods industries that utilized press agents and advertisers to push their interests and hawk their wares. For the editors who sought its support in their international campaign, the state thus represented both a means to project press freedom ideals and a grave threat to the press' crucial role in reporting news objectively and thoroughly.

In this sense, the movement to export First Amendment and journalistic values also reflected a strong professional identity among the press leaders who viewed the journalistic

enterprise as free, independent, and objective, and staffed by full-time, well-trained, professional journalists. Journalistic objectivity in this context served as an American professional ideal and norm, and stood in opposition to political and ideological partisanship and to subjective or biased reporting. In journalism historian Michael Schudson's authoritative account, objectivity defines and disciplines journalism as a vocation: it binds publishers, reporters, and editors together through a series of rituals that define what journalism is and how it is produced; it allows constituents of the journalistic community to recognize and exclude those who fail to practice it correctly; and it organizes the bureaucratic practice of journalism and the training of those who wish to enter the profession. The objectivity ideal helps justify the press' explicit right to be free from government constraint, and it constitutes the pillar of the press' role as an independent institution of civil society—one just as important to the protection of individual rights and democratic institutions as an independent judiciary.

B. The Right to Know and Freedom of Information, from Press Ideals to Legal Informational Rights

All of the circumstances described above—the political economy of the international news industry, the AP's struggles with the European news cartel, the emergent ideal of press freedom during the gathering Cold War, and the press' self-conception of journalism as a vocation organized around the objective reporting of news—contributed to the historical context in which the phrases "freedom of information" and the "right to know" began to circulate. Kent Cooper used the phrase "right to know" as early as 1945 and as the title of his 1956 book on the general topic of press freedom. He defined it both affirmatively, as the right of individuals to have access to full and accurate news reporting, and negatively, as prohibiting the government from interfering with the relationship between the press and its public. "It means," he wrote,

"that the government may not, and the newspapers and broadcasters should not, by any method whatever, curb delivery of any information essential to the public welfare and enlightenment." He also offered a modern revision of the Constitution's First Amendment: "Congress shall make no law . . . abridging the Right to Know through the oral or printed word or any other means of communicating ideas or intelligence." In Cooper's understanding, the right to information belongs to the public; the state has the legal duty to disclose and is prohibited from restraining the press; and the independent commercial press serves as the essential go-between with an ethical, as opposed to legal, duty to ferret out and present information. The press—which enjoys a longstanding and well-entrenched constitutional right—would protect the public's right by transforming data into knowledge and thereby allow the reading public to respond rationally and act politically, as capable democratic citizens.

The term "freedom of information" had a similar meaning. President Franklin Delano Roosevelt used it in a press conference in 1940 to refer to the flow of uncensored news, identifying it as one of the key principles of democratic government and the un-enumerated freedoms that the Constitution set in motion, while President Truman used it similarly in a message to Congress in 1947 reporting on U.S. participation in the United Nations. At the same time, news editors viewed and deployed the phrase as part of the broad ideal of press freedom. The ASNE established a "Freedom of Information Committee" to push for international speech liberalization, and Herbert Brucker, one of that committee's chairmen during the early post-war period, appropriated the term as the title for his 1949 book on the need for press freedom. The nascent international human rights movement appropriated the phrase as well. In its first meeting in 1946, the United Nations General Assembly issued a declaration calling for recognizing and protecting the freedom of information as a fundamental, "touchstone" human

right while defining it quite broadly: "Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetters." As concepts, the right to know and freedom of information overlap in a number of important ways and have endured as key phrases in the movement for open government. First, although they concern much more than simply *government* information, the concepts identified and sought to protect an international and national right that would limit the state's control of information flows. Second, they conceptualized the state as something distinct from the public—as an entity that represents and governs its citizens but is distant from them. The public must be protected from the state, while the state must be checked from violating private individuals' rights, which in this context meant the right to receive information and to "know." Third, the terms assume that information, in its raw and cooked forms as data, news stories, and opinion, constitutes a truth to which the public must have access in order to gain knowledge and act as citizens.

And finally, at least in its American version as defined by Cooper and Brucker, the terms contemplate a free and independent press as the public's agent in protecting the right to know and in delivering the information that should flow freely. Rights (to know) and freedoms (of information) simultaneously enable the press to report objectively, without the constraints of excessive state or private interest, and allow that independent pillar of society to play its crucial role in a functional democracy. As the institution capable of mediating between the public and a distant, increasingly complex state, the press had come by midcentury to view itself as the community's representative and enforcer of public rights, capable of unveiling and criticizing the state. "The right of the individual to know," Cooper asserted, is "coordinated with the right of his newspaper to tell him all the news, except what the government was guilty of withholding and suppressing." The original FOI campaign's goals were to transform that inchoate notion of

"guilt" into a legal wrong and to transform the abstract ideal of a "right" into an enforceable cause of action for the individuals to whom it belonged.

C. The Political Enactment of Legal Informational Rights

By the late 1940s, ASNE's Freedom of Information Committee, having been frustrated in its efforts to formalize press freedoms in international law, turned its attention to press freedom in the U.S. and to one particular issue: government secrecy. *Louisville Courier-Journal* editor James Pope's term as Committee chair, which started in 1950, proved integral to the organization's shift towards a political fight against federal, state, and local government secrecy and in making the fight against it explicitly political. Pope's committee began by organizing state-level committees to help provide legal advocacy and defense on behalf of local newspapers, and to serve as the basis for an effort to change federal policy. Pope recruited Harold Cross, a retired media lawyer and journalism professor at Columbia, to serve as the Committee's legal advisor. In this capacity, Cross produced *The People's Right to Know* (1953), a book that both summarized the patchwork of existing constitutional and administrative laws regulating government secrecy and advocated for reforms to strengthen the public's access to information.

As Pope noted in his foreword to Cross' book, ASNE stood alongside Cross as an "agent of the people" to enforce the people's right of access to information on the public's behalf. In that role, Cross declared that the press would strike down "the barriers to access to public records and proceedings," which was especially necessary, Pope noted, because citizens required assistance to understand an "increasingly complex government." The title Cross chose at once echoed the rights concept from the press' earlier advocacy of press freedoms abroad and framed

the problem of secrecy as one of insufficiently enforced legal rights. The book opened with the most prominent terms from the earlier free press campaign:

> Public business is the public's business. The people have the right to know. Freedom of information is their just heritage. Without that the citizens of a democracy have but changed their kings.

"Rights" against the state, along with the ideal of "freedom" from state barriers to access, served as the logical way for a legal advocate like Cross to champion transparency. But the prevailing law of access to government information, Cross complained, was a mess; it existed only "where you find it," in a "welter of varying statutes, conflicting court opinions and wordy departmental regulations [that] present the problem as a veritable Chinese puzzle." The resulting information-access law could not confront and control the expansion of Cold War secrecy. Quoting a recent student-authored law review publication, Cross lamented the fact that access to information was "a neglected constitutional right," and argued that it ought to be encompassed within First Amendment protections. To that end, he cited a range of historical and contemporary figures for support. His efforts to find a constitutional basis for the "right to know" have proved unavailing, however, as the U.S. Supreme Court has never acknowledged such a broad right to informational access in the Bill of Rights. Nevertheless, academics and advocates, most prominently First Amendment scholar Thomas Emerson, have repeated Cross' argument in the decades that followed.

As an alternative, Cross offered federal legislation as a second-best path to legal rights. The Administrative Procedure Act, enacted in 1946, provided both a model of statutory control over administrative agency operations and a potential home for a freedom of information act. But it would require amendment, as its existing information-access provisions were too vague

and riddled with exceptions; it also failed to create an enforceable public right to information that would allow an aggrieved citizen (whether or not a member of the press) to seek judicial review of a government entity's refusal to disclose information. To bridge this substantive and procedural gap, Cross urged Congress to "begin exercising effectually its function to legislate freedom of information for itself, the public, and the press" by creating a legal right to know. Cross' argument certainly convinced his ASNE sponsors; "[e]nlisted as an adviser," James Pope wrote, "he became our leader."

Soon after the publication of Cross' book in 1953, the ASNE Committee finally found a potentially effective political government actor and partner for establishing the legal rights that Cross described. In November 1954, a new Democratic majority wrestled control of the U.S. House of Representatives back from a small Republican majority that had ridden Dwight Eisenhower's coattails in his 1952 election to a first presidential term. Although Eisenhower's moderate conservatism held at arm's length both Senator Joseph McCarthy (whose prominence was fast receding by 1954) and his vice president Richard Nixon, politics was politics, and the Executive Branch's expansion during the New Deal and its administrative prerogative over government secrets following the end of World War II constituted a source of political conflict. Democrats had controlled the Presidency since Franklin Roosevelt's election in 1932; now, even with a moderate war hero in the White House and a common enemy in the Soviet Union, the Congress viewed its role vis-à-vis an electoral foe as both a principled, institutional opposition to the Executive and a political opposition to a Republican. To that end, the House of Representatives' Government Operations Committee, chaired by Democratic Representative William Dawson of Illinois, established a Special Subcommittee on Government Information,

chaired by California Representative John Moss, as a means to investigate Executive Branch secrecy.

ASNE leaders and prominent newspaper editors played key roles in spurring the Subcommittee that Moss chaired (referred to popularly as "the Moss Committee") into action. The press provided personnel, with former journalists dominating the Committee's staff, while prominent editors helped devise its aggressive strategy of investigating federal agencies that kept information secret from the press and public. ASNE provided legal advice by introducing Cross to Moss and his Committee; Cross would play a key role as the Committee's legal advisor until his death in 1959. The press also provided publicity, as newspapers throughout the country promoted the Committee's work and especially its hearings and investigations. And, through its lobbying and Cross's advice, the press helped frame the issue for the Committee as one of insufficiently recognized and enforced legal rights. In James Pope's words when he testified at the Moss Committee's first hearing, "freedom of information is not a political issue. . . . The right to know is the right of the people." Tellingly, Harold Cross' argument in favor of imposing legal obligations through the creation of private statutory rights proved ultimately to be the only satisfactory legislative solution to secrecy. After an amendment to existing law failed to change bureaucratic norms, the Freedom of Information Act—a statute whose very title was apparently appropriated from the title of ASNE member Herbert Brucker's 1949 book—finally gained sufficient legislative support in 1966, cleared Congress's procedural hurdles, and was enacted despite President Johnson's ambivalence (if not resigned hostility).

The FOIA enacted a version of a "right to know" and pledged to protect the informational "freedom" that had been first conceptualized and developed in the early post-war and Cold War effort to instill Western democratic values abroad through the ideal of a free, independent press.

In its original enactment and in subsequent amendments, Congress has continually recognized and proclaimed the crucial role that the right to know and informational freedom play in a democracy—legislative declarations that courts have consistently restated when reviewing claims filed under the FOIA. The statute recognized an individual right to information and granted broad private rights to any person to seek judicial enforcement of those rights—rights that were themselves balanced against the state's need to keep some information from the public eye. Placing certain procedural burdens on agencies and creating a private right of action for aggrieved individuals, the FOIA delegated to the federal judiciary the task of protecting the right and enforcing the duties. Working together, Congress and the press had placed the right to know firmly within the institutional framework of the rule of law: agencies would henceforth have to follow legislatively prescribed rules enforced by the Judiciary, while the press would serve as a private enforcement mechanism, harnessing this newly established right to hold the government accountable and inform the public.

D. Conclusion: The Limits of Law

Traditional legal concepts—the judicial enforcement of individual rights and those of the press—animated and grounded an American open-government movement that viewed the state as a threat to democracy and press freedom. In its actions against the state, the press worked with state actors—an ironic element in any reformist, civil-libertarian movement and one that has remained consistent from the World War II period through FOIA's enactment. These efforts assumed and helped constitute an institutional structure for these rights: the press, acting as the public's agent, would advance and take advantage of the right to know; Congress and the courts would play key roles in helping to enforce them; and information would thereby be freed for the

public to consume and act upon in its members' role as democratic citizens. The rhetoric was broad and the terms powerful because the stakes were so high. A democratic system demanded no less than committed political advocacy, especially in the midst of a Cold War that produced an enormous quantity of state secrets but that required a free and independent press to remain legitimate and accountable.

The American FOIA is now merely one legislative enactment in a much broader universe of legal rights and duties created by constitutional and legislative mandates in order to advance some ideal or component of transparency. FOI provisions regulate government activity around the world as well as in American states and localities. The proliferation of legal rights has not created fully or, to many in the transparency-advocacy community, even satisfactorily open governments, as political, practical, and bureaucratic obstacles have obstructed the state's visibility to the public. In the U.S., the annual Sunshine Week and Freedom of Information Day events, established in 2005 to bring attention to freedom of information laws, include a regular declaration that more must be done to open government to the public's gaze. International FOI advocates express the same frustration with other nations' compliance with their own laws. Even when enacted, formal legal commands by themselves have not been able to overcome all forms and instances of governmental resistance to disclosure, whether that resistance is intended to hide corruption or incompetence, or as sincere efforts to protect internal deliberative processes, or simply because officials find it easier and less costly not to disclose information.

Despite these frustrations—or perhaps *because* of them—numerous FOI NGOs still actively advocate for a classically liberal, rights-focused approach to transparency and continue to view the press as the essential mediating institution capable of enforcing legal rights and informing the public. But in part as a response to the frustrations that this resistance causes, and

in part due to other factors—including developments in information technology, changing conceptions of the state, and the political economy of global commerce and international financial institutions (IFIs)—some contemporary advocacy groups have broadened their approach to understanding the asymmetric information problem, and champion new approaches to transparency that look beyond formal law and its enforcement. The remainder of this article outlines these alternative fixes to the problem of government secrecy—fixes that either view legal reform as part of a broader program or that abandon law altogether.